Supreme Court, U.S.
FILED
02 697 NOV 04 2002
OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

ISIDRO GOMEZ and LINDA L. GOMEZ, Wife,

Petitioners,

v.

W. J. ATKINS, in his official and individual capacity,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GARY K. SHIPMAN
Counsel of Record
C. WES HODGES, II
SHIPMAN & HODGES, L.L.P.
Attorneys for Petitioners
11 South Fifth Avenue
Wilmington, N.C. 28401
(910) 762-1990

177127

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

9HPP

QUESTIONS PRESENTED

I. Has the Fourth Circuit decided an important question of federal constitutional law that has not been, but should be, settled by this Court?

II. Is the Fourth Circuit's opinion in conflict with decisions of other United States Courts of Appeal holding that a law enforcement officer is not entitled to qualified immunity where the officer either intentionally or with reckless disregard for the truth includes material false and misleading information in, or omits clearly critical information from, an application for an arrest warrant to a magistrate?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were:

Isidro Gomez and wife, Linda L. Gomez, Plaintiffs-Appellees (Petitioners herein)

and

W.J. Atkins, in his official and individual capacity, Defendant-Appellant (Respondent herein)

The remaining Defendants in the District Court, Earl Butler, Sheriff of Cumberland County, in his official capacity, and Western Surety Company, were not parties to the appeal in the Fourth Circuit. The Fourth Circuit denied the Defendant Earl Butler's petition for permission to appeal the denial of his motion for summary judgment. Nevertheless, the decision of the Fourth Circuit resulted in the dismissal of the Petitioners' claims against these Defendants.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	ix
Statement of Basis for Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case and Facts	2
(a) Statement of the Case.	2
(b) Statement of the Facts.	3
Argument	13
I. The Fourth Circuit Has Decided An Important Question Of Federal Constitutional Law That Has Not Been, But Should Be, Settled By This Court.	13
(a) The consistent application of the judicially created qualified immunity doctrine to § 1983 cases alleging the deprivation of Constitutional rights is an important matter deserving of the Supreme Court's attention and guidance.	13

Contents

Page

(b) This Court has never decided the civil equivalent of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), and should use this case to bring harmony to the U.S. Courts of Appeal on this important constitutional issue. 15

II. The Fourth Circuit's Opinion Is In Conflict With Decisions Of Other United States Courts Of Appeal Holding That A Law Enforcement Officer Is Not Entitled To Qualified Immunity Where The Officer Either Intentionally Or With Reckless Disregard For The Truth Includes Material False And Misleading Information In, Or Omits Clearly Critical Information From, An Application For An Arrest Warrant To A Magistrate. 17

(a) The Fourth Circuit's decision directly conflicts with decisions of other U.S. Courts of Appeal regarding the application of *Franks v. Delaware* and *United States v. Leon* to claims for qualified immunity in § 1983 civil actions. 17

Contents

Page

(b) The Fourth Circuit's decision directly conflicts with decisions of this Court regarding the standard for summary judgment, and decisions of other U.S. Courts of Appeal applying these standards in the context of a claim for qualified immunity in a § 1983 action. . . 25

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 26

Aponte Matos v. Toledo Davila, 135 F.3d 182 (1st Cir. 1998) 23

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) 20

Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991) .. 22

Bruning v. Pixler, 949 F.2d 352 (10th Cir. 1991) 16, 18, 23

Burke v. Beene, 948 F.2d 489 (8th Cir. 1991) 16, 18

Butler v. Elle, 281 F.3d 1014 (9th Cir. 2002) 16, 18, 22, 23, 24

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). 25

DeLoach v. Bevers, 922 F.2d 618 (10th Cir. 1990) 16, 18, 27

Ex parte Lange, 85 U.S. 163, 21 L. Ed. 872, 18 Wall. 163 (1873) 13

Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) ..... *passim*

Cited Authorities

Page

Golino v. City of New Haven, 950 F.2d 864 (2d Cir. 1991) 16, 18, 21, 22, 26, 27

Hale v. Fish, 899 F.2d 390 (5th Cir. 1990) 23

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 17, 25, 29

Hervey v. Estes, 65 F.3d 784 (9th Cir. 1995) 22

Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989) 18, 23, 27, 28

Hindman v. City of Paris, Tex., 746 F.2d 1063 (5th Cir. 1984) 18, 28

Kelly v. Curtis, 21 F.3d 1544 (11th Cir. 1994) 23

Kungys v. United States, 485 U.S. 759, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) 20, 21, 29

Lippay v. Christos, 996 F.2d 1490 (3d Cir. 1993) 16, 18, 22, 24

Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985) ... 28

Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) 16, 22, 23

Olson v. Tyler, 711 F.2d 277 (7th Cir. 1985) 24

Owen v. City of Independence, 445 U.S. 622 (1980) 14

Cited Authorities

Page

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) 20, 21, 29

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976) 26, 28

United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) 20

United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962) 25

United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) 15, 16, 23, 24, 26, 29, 30

United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965) 15

United States Constitution:

U.S. Const. amend. IV 1, 2, 13, 15, 22, 24, 25

Statutes:

28 U.S.C. § 1254 (1993) 1

28 U.S.C. § 1331 (1993) 2

42 U.S.C. § 1983 (1984) ..... *passim*

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Dated July 11, 2002 ..... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of North Carolina, Western Division Dated August 27, 2001 And Filed August 28, 2001 ..... 25a

Appendix C — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing And Rehearing En Banc Dated And Filed August 5, 2002 ..... 52a

STATEMENT OF BASIS FOR JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") were filed on July 11, 2002. On July 24, 2002, the Petitioners timely filed a Petition for Rehearing *En Banc.* On August 5, 2002, the Fourth Circuit denied the Petitioners' Petition for Rehearing. (Appendix C, pp. 52a-53a) This Court has jurisdiction to review the judgment of the Fourth Circuit on a writ of certiorari pursuant to the provisions of 28 U.S.C. § 1254 (1993).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves application of 42 U.S.C. § 1983 (1984) and the Fourth Amendment to the United States Constitution:

42 U.S.C. § 1983 (1984) provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1984).

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE AND FACTS

(a) ***Statement of the Case.***

The Petitioners Isidro and Linda L. Gomez instituted this action on September 10, 1999, based upon the wrongful arrest and prosecution of the Petitioner Isidro Gomez (herein "Isidro"), amounting to a violation of his Fourth Amendment right to be arrested only upon probable cause. The Respondent W.J. Atkins was the investigating officer and the one who obtained the arrest warrant. Jurisdiction in the District Court was premised on 28 U.S.C. § 1331 (1993), as a proceeding to enforce rights and remedies secured by the United States Constitution, through the mechanism provided in 42 U.S.C. § 1983 (1994).

On November 17, 2000, the Respondent filed a motion for summary judgment, principally based on the doctrine of qualified immunity. In response, the Petitioners contended that the Respondent lost the shield of qualified immunity when he included material false and misleading information in, and omitted clearly critical exculpatory information from, his application to the magistrate for a warrant to arrest Isidro for first degree murder.

On August 28, 2001, the Honorable W. Earl Britt, Senior United States District Judge for the Eastern District of North Carolina, denied the Respondent's motion for summary judgment, concluding as follows:

> [T]he court concludes that when Atkins' statement of the evidence is corrected for misleading, false and omitted evidence, all that remains is a practically unrefuted alibi, no physical connection of Isidro to

> the crime with the exception of broad class evidence, circumstances that strongly suggest that Rickie Jean was murdered long before Isidro left Atlanta, and evidence that undeniably suggests that someone other than Isidro was the murderer (i.e., size "7" footprints). In sum, having thoroughly reviewed the totality of evidence available to Atkins at the time he sought the arrest warrant, the court concludes that the evidence does not support a finding of probable cause. The court further concludes that a reasonable officer could not have believed that there was probable cause to seek an arrest warrant under the circumstances.

(App. B, pp. 45a-46a)

On August 31, 2001, the Respondent gave notice of appeal to the Fourth Circuit. On July 11, 2002, the Fourth Circuit issued its opinion, reversing the District Court and granting qualified immunity to the Respondent. In the opinion, discussion of the false and misleading information submitted by the Respondent to the magistrate in his application for an arrest warrant — the primary factual and legal basis of the Petitioners' response to the Respondent's claim of qualified immunity — was reduced to a footnote. (*See* App. A, p. 8a n.2) In a separate concurring opinion, Judge Hamilton expressed his disdain for the Respondent's conduct of including "material" false and misleading information in his warrant application, "which dealt directly with the heart of the State's case, i.e., whether Isidro murdered his first wife," stating that such conduct is "a disturbing commentary on the manner in which law enforcement activities are conducted in Cumberland County, North Carolina." (*See* App. A, p. 24a)

(b) ***Statement of the Facts.***

Isidro and Rickie Jean Murray (herein "Rickie Jean") were married in September of 1968. (JA 1488) By June of 1980, she and Isidro had been living separate and apart in Fayetteville, North Carolina, for about a year and a half. (JA 1489) Isidro had custody of their children. In July of 1980, Isidro and Rickie

Jean met for a weekend in Atlanta to attempt to reconcile. (JA 1489) Isidro drove from Texas, where he had dropped off their sons to stay at his parents' house for the summer, and Rickie Jean, who worked for Piedmont Airlines and could fly for free, caught a flight to Atlanta. (JA 1318-19) They had an enjoyable weekend and were even intimate. (JA 1320)

On Sunday, July 13, 1980, they left to return to Fayetteville driving Isidro's car. About seven or eight miles down Interstate 20, the crankshaft pulley sheared off and the car broke down. (JA 1490) This was later determined to be a manufacturing problem. (JA 1491, JA 1503-07) The parts Isidro needed to fix his car could not be purchased until a Chevrolet dealership opened up on Monday morning. (JA 1491) Some friends of the family, the Hortons, invited Isidro and Rickie Jean to spend the night. Rickie Jean had to be at work at Piedmont at 6:30 a.m. on Monday morning and did not want to miss her scheduled shift. (JA 1491) At that time, she was only a part-time employee of Piedmont, but she loved the job and wanted badly to become a full-time employee. (JA 1322) She had never missed a day of work or even been late for a shift. (JA 644) Consequently, Rickie Jean decided to fly back to Fayetteville that night on an evening Piedmont flight. (JA 1491) After dinner, Isidro and the Hortons dropped Rickie Jean off at the airport. (JA 1492)

Isidro spent Sunday night with the Hortons. In the morning, Isidro purchased the parts he needed to fix his car. After making the necessary repairs, Isidro left for Fayetteville sometime between 10:00 and 10:30 a.m., Monday, July 14, 1980. Mrs. Horton and Sandra Gail Mills, the fiancée of the Hortons' son, were at the house when Isidro left. It is roughly 376 miles from the Hortons' home to the Gomez residence in Fayetteville. Driving at about the speed limit (55 m.p.h. on the interstate at that time), and stopping once to get gas, have a snack, and stretch his legs, Isidro arrived home at around six o'clock in the evening. (JA 1492, 1508)

After noticing what appeared to be blood stains at the house, learning from a call from Rickie Jean's supervisor that she did not show up for work that morning, and being unsuccessful in

his efforts to locate her, Isidro called the Cumberland County Sheriff's Department. (JA 1495) The first deputy arrived around 7:00 p.m., and other investigators arrived shortly thereafter. (JA 1495-96) After the house was searched and the evidence collected, Isidro voluntarily went down to the law enforcement center to be interviewed by the investigating officers. Isidro was wearing white gym shorts and a white tank-top shirt. He had no cuts, bruises or abrasions on his hands, face, arms, legs, or any other exposed part of his body. (JA 1496)

At approximately 10:45 a.m. the next morning, Rickie Jean's dead body was discovered in the back floorboard of her car in a wooded area about a mile or so from the Gomez house. She was still in her nightgown. (JA 1496) The ID technicians were able to lift latent fingerprints and palm prints from Rickie Jean's car. (JA 450, 454) The fingerprints did not belong to Rickie Jean or Isidro. (JA 458-59)

An autopsy revealed that Rickie Jean had been beaten badly about the face and body and stabbed to death. The fatal blow was a stab wound to the chest that punctured her heart and lungs. She also had defensive wounds and blood under her fingernails. (JA 470-75) Because she was still in her nightgown, and never made it to work, it was apparent that she had been murdered or abducted before her scheduled work time on Monday morning. (JA 963-64)

The investigators continued to investigate Rickie Jean's murder. (JA 1498) They tested the physical evidence and talked to a number of witnesses. Some of Rickie Jean's friends claimed that she told them that Isidro had physically abused her at times and had even threatened to kill her. Others said Rickie Jean never told them any such thing. Nobody, however, ever saw Isidro hit or threaten his wife. (JA 1433-34) Tests of the evidence collected at the Gomez house revealed the presence of type "O" and type "A" blood. Rickie Jean's blood type was "O," and Isidro's blood type was "A," which is a common blood type. (JA 455-57)

Fibers collected from Rickie Jean's body and the bedding found in her car were tested and found to be "microscopically

consistent" with Isidro's hair. (JA 462-63) A microscopic analysis of a hair follicle in 1980, however, could only reveal whether the hair was human hair, if it was a head hair or body hair, whether the person was Caucasian or Negroid, and perhaps the approximate age of the person (*e.g.*, if the hair was gray, the person probably was older). Such an analysis could not identify the actual person to whom the hair belonged. (JA 1535)

Isidro cooperated with the investigation at all times. On June 1, 1981, as Isidro was preparing to move from the area because of a job transfer, two of the investigating officers came by his house. They told Isidro that his presence in Atlanta had been confirmed and that they knew he did not kill Rickie Jean. (JA 1498, 1517-18) This was the last time Isidro would hear from the Cumberland County Sheriff's Department for nearly fifteen years.

The Respondent Atkins (herein "Atkins") first began reviewing the Gomez file in late October or early November, 1995. (JA 1079) On November 8, 1995, Atkins traveled to Chesterfield, Virginia, to interview Isidro regarding Rickie Jean's murder. During the interview, Atkins asked Isidro what his shoe size was, and Isidro told him that he wore a size "11" or "11 ½" depending on the type of shoe. Atkins memorialized this in the notes he took during the interview. (JA 1499, 1519-24)

In April of 1996, at the request of Atkins, Isidro provided new hair and blood samples for DNA testing. (JA 1500) Atkins sent Isidro's blood sample to LabCorp, a private laboratory, on April 16, 1996, along with some reference samples of Rickie Jean's DNA and fingernail clippings collected by the medical examiner. (JA 1147-49, 1275-76) A serology test on these clippings in 1980 had revealed the presence of type "A" blood under the nails. (JA 455-457) LabCorp only tested half of the clippings. (JA 1261) LabCorp determined that the DNA profile obtained from the tested nail clippings was "consistent with the DNA profile" of Rickie Jean and "different than the DNA profile" of Isidro Gomez. LabCorp sent these results to Atkins on April 29, 1996. (JA 1275-76)

By May 14, 1996, Atkins had not uncovered any additional evidence that pointed to the guilt of Isidro Gomez. (*See* JA 250-762; Supp. JA 1623-28) Furthermore, he had not asked LabCorp to test the rest of the fingernail clippings (JA 1267-68), nor had he made any effort to seek any laboratory comparison between the hair samples provided by Isidro and the fibers collected at the crime scene in 1980. (JA 1123-24)

On May 14, 1996, Atkins applied for a warrant to arrest Isidro for Rickie Jean's murder. (JA 1130) In support of his warrant application, Atkins presented the magistrate with an Affidavit and a copy of his "Statement of Investigating Officer in Detail" (herein "Statement"). (JA 1164-65) The Affidavit set forth no substantive facts whatsoever relating to Isidro's alleged guilt (*See* JA 1532-38), and the Statement prepared by Atkins and read by the magistrate supplied the factual basis for the issuance of the arrest warrant. (JA 1534-1535) The Statement, which purports to contain facts pointing to Isidro's guilt, is rife with false and misleading statements (JA 1534), and omitted material exculpatory information (JA 1538), bearing directly upon Atkins' theory that Isidro stabbed Rickie Jean to death. (JA 1534)

The very first sentence of Atkins' Statement is totally false. In Paragraph 1 of the Statement, Atkins states that, "[a]t the time of the autopsy of the Victim, *the Defendant's* body hairs were found on the body of the Victim." (JA 427) (emphasis added) The 1980 SBI report only concluded that the hairs found and the sample provided by Isidro were "microscopically consistent." (JA 462-63) As stated earlier, the only thing such a test could tell about an individual was whether he was Caucasian or Negroid, and perhaps the rough age of the individual. (JA 1535) Atkins either intentionally lied, or recklessly assumed that "microscopically consistent" meant the hair belonged to Isidro. Atkins never made any attempt to find out what it meant. (JA 1104) Any reasonable homicide investigator in 1996 should have known that the 1980 test could not provide an identification of the person to whom the hair belonged. (JA 1535) Regardless of whether it was intentional or merely reckless, this is an

egregious mistake that never should have occurred, as it placed Isidro directly at the second crime scene, the car in which Rickie Jean's body was discovered. (JA 1534)[1]

In Paragraph 4 of the Statement, in yet another effort to place Isidro at the scene of the crime by tying him to the bloody shoe prints left at the house by the murderer, Atkins states that "[t]he Defendant's shoe size *by his own statement* is '7' to '7 ½' depending upon what type of shoe." (JA 427) (emphasis added) This is directly contrary to Atkins' own notes of his November, 1995, interview with Isidro, in which Atkins recorded that Isidro said his shoe size was "11" to "11 ½." (JA 1499, 1519-24) Atkins took clearly exculpatory information (Isidro's actual shoe size) and, either on purpose or through gross recklessness, transformed it into incriminating evidence placing Isidro at the first crime scene, the Gomez residence. (JA 427)

Isidro's alibi was irrefutable; it had been in 1980 and it was in 1996. (JA 1126) In an effort to refute the irrefutable, Atkins told the magistrate that "while the Defendant has stated several times that he arrived in Fayetteville, N.C. at [6:00 p.m.], there are *witnesses* who have stated they spoke personally with Isidore (sic) Gomez by telephone as early as [3:00 p.m.] this same day and at least 3 hours prior to him stating he arrived at [6:00 p.m.]." (JA 430) (emphasis added) While the false information set forth in Paragraphs 1 and 4 could potentially be the product of either intent or gross recklessness, this statement is an outright fabrication. Atkins has admitted that these alleged "witnesses" were, in fact, only a single witness — David T. Rogers, Rickie Jean's supervisor at Piedmont. (JA 1190) Moreover, the Statement by Atkins is a gross misrepresentation of the statements given to investigators in 1980 and 1996. (*See* JA 250-762; Supp. JA 1623-28)

---

1. In Paragraph 2, Atkins informed the magistrate that SBI testing revealed that the blood found under Rickie Jean's fingernails was type "A," the same type as Isidro. (JA 427) As with a microscopic hair analysis, blood typing yields only class evidence, with a class numbering in the millions. (JA 1535) Atkins did not inform the magistrate, however, that DNA testing of the nail clippings did not match Isidro's DNA.

In 1980, Mr. Rogers told the detectives that his first call to Isidro was at 6:20 p.m. (JA 645), which is consistent with Isidro's recollection. (JA 1494) In 1996, sixteen years later, Mr. Rogers told Atkins that he "believed" that it was around 3:00 p.m. when he called and spoke with Isidro. (JA 640) This was inconsistent with what Mr. Rogers had originally stated in 1980, only two days after he spoke with Isidro on the phone. (JA 645) In his 1996 statement, Mr. Rogers expressly told Atkins that "his recall of the events in July, 1980 and what he said in his interviews then with the original Detectives might be different, but what he had told the Detectives in July, 1980 would be the facts and the truth as he knew it then and that [t]he notes written by the Detectives in 1980 would be the facts as he told it to them." (JA 641) Instead of providing the magistrate with the version told to investigators in 1980, only days after the event, and which confirmed Isidro's version, Atkins used only the self-serving 1996 statement.[2] (*See* JA 427-32)

These three examples of the false and misleading information Atkins supplied to the magistrate, if true, would affirmatively refute Isidro's alibi, thus giving him the opportunity to commit the crime (if Rickie Jean was not murdered prior to her scheduled work time — *see infra*), and placing Isidro at *both* crime scenes. These false and misleading statements, taken in a light most favorable to the Petitioners, were material to a finding of probable cause. Without them, and other material false statements and omissions, the magistrate was left with nothing more than ambiguous and neutral facts, with no context, (JA 1534, 1607) and no direct evidence placing Isidro (and not

---

2. Based on this particular misrepresentation, it is hard to understand the Fourth Circuit's conclusion that the Petitioners "failed to forecast any evidence establishing that the [Statement] was intentionally falsified by Sergeant Atkins." (App. A, p. 22a) In any event, the proper standard is whether the officer intentionally *or with reckless disregard for the truth* submitted false and misleading information to the magistrate in a warrant application. (*See infra*)

a class of millions of which Isidro was but a member) in North Carolina in time to kill Rickie Jean or be at either crime scene.[3]

In a final attempt to refute Isidro's alibi, Atkins recounted SBI Agent Jerry Webster's account of his trip from Atlanta to Fayetteville, purportedly recreating Isidro's drive on July 14, 1980. (JA 430) Webster stated that the trip took approximately "four and a half to five hours" without speeding. (*Id.*) It is precisely 376.4 miles from the Hortons' home in Ellenwood, Georgia, to Isidro's house in Fayetteville. Most of the trip, but not all of it, consisted of driving on Interstates 20 and 95. In 1980, the speed limit for interstate travel was 55 miles per hour. (JA 1492, 1508) To drive this distance in five hours, one would have to average 75 miles per hour, even taking into account traffic lights, stop signs, and any rush hour traffic. To drive it in four and a half hours, one would have to average approximately 84 miles an hour. These average speeds are inconsistent with Webster's claim, adopted by Atkins, that he did not speed. (JA 1492-93) Webster subsequently admitted that this driving time estimate was wrong. (JA 1465-68) Atkins never tried to determine how far it was from the Hortons' house to Isidro's house, or how long it would take to make the drive. (JA 1210-1211)

Atkins also failed to include in his Statement several facts that were clearly relevant and material to the theory he presented to the magistrate. He failed to inform the magistrate that the Hortons, Isidro's chief alibi witnesses, had both passed polygraph tests in 1980. (JA 427-32, 954) Atkins never spoke

3. Atkins' Statement contained numerous other false and misleading assertions. For example, Atkins stated that blood was found on a wet washcloth on the edge of the bathtub, and that the blood was diluted from having been washed out. (JA 430) This was meant to create the inference that Isidro, who admitted to recently showering in that bathroom, had rinsed out the bloody washcloth in an effort to hide the crime. In fact, the 1980 serology report found no blood on the washcloth. (JA 457) Atkins also stated that a check with Chevrolet indicated that there was never a problem with the crankshaft pulley. (JA 430) This is also untrue. (JA 1491, 1503-07)

with the Hortons, citing "budget restraints." (JA 1115) Atkins did not inform the magistrate that the latent fingerprints and palm prints lifted from Rickie Jean's car did not match Isidro's prints. Atkins did not tell the magistrate that: Rickie Jean loved her job at Piedmont; had never been late for a single shift; failed to show up for work on Monday morning, July 14, 1980 (the sole reason she left Atlanta on Sunday evening); and that Rickie Jean was still wearing her nightgown when she was found (*See* JA 427-32, 954) – facts all strongly indicating that she was murdered sometime between the time she arrived back in Fayetteville late Sunday evening and her scheduled time for work at 6:30 a.m. the next morning (*See* JA 963-64), when Isidro was indisputably still in Atlanta. The investigators, including Atkins, could never determine where Rickie Jean was or who she was with during this time. (JA 1127)

On May 14, 1996, based upon Atkins' Statement, and all of the false and misleading information contained therein, the Magistrate issued a warrant for Isidro's arrest, charging that he "did of malice aforethought kill and murder" Rickie Jean Gomez. (JA 953) Isidro was arrested the same day.

After Isidro's arrest, the decision was finally made to test the rest of Rickie Jean's fingernail clippings. On October 4, 1996, Atkins delivered the remaining clippings to LabCorp for analysis. On October 30, 1996, LabCorp issued its conclusions: "The DNA profile obtained from the left nails (Item 2) is consistent with a mixture of DNA from Ricki (sic) Gomez (Item 3) *and another individual*. Isidro Gomez (Item 1) is *excluded* as a possible contributor to the genetic material in this sample." (emphasis added) The type "A" blood found under Ricki Jean's fingernails did not belong to Isidro Gomez. (JA 1277-78)

In August of 1997, the Sheriff's Department finally submitted the hair samples collected from Isidro Gomez in 1996, prior to his arrest, and the fibers collected from Rickie Jean's body in 1980, to the FBI Laboratory for analysis. The FBI Lab found that there was no microscopic association between the samples. (JA 1569-71) Because the samples were microscopically dissimilar, there was no need to do DNA testing.

Furthermore, one of the "hairs" found on Rickie Jean's body was actually an "off-white carpet-type fiber" — it was not even a hair. (JA 1569-71) The fibers found on Rickie Jean's body were not Isidro's hairs. (JA 1569-71)

Thereafter, the Assistant District Attorney prosecuting Isidro questioned whether the State had a "good faith basis to proceed" with the prosecution. (JA 1572), On January 13, 1998, the State dropped all charges against Isidro based upon a lack of evidence. A memorandum attached to the dismissal identifies the State's reasons for the dismissal. (JA 963-64)

This memorandum cites both the DNA analysis from LabCorp and the FBI hair analysis, both of which excluded Isidro. Although great pains are taken to point out that these reports did not exist at the time of Isidro's arrest, the memorandum does not state that the hair and blood samples, which formed the basis for the tests, were voluntarily provided by Isidro *prior* to his arrest. The memorandum also notes that there were no latent fingerprints belonging to Isidro; that the bloody shoe print tracks on the driveway were too small to match Isidro's shoe size; that it was apparent that Rickie Jean was killed sometime before her scheduled time for work on Monday, July 14, 1980; that Isidro's alibi for that time period "is not refutable;" and that Isidro's alibi witnesses successfully passed polygraph tests and had given consistent statements to the investigators. (JA 963-64) *All* of this exculpatory evidence was in Atkins' possession prior to Isidro's arrest, but was not provided to the magistrate in the warrant application. (*See* JA 250-762; Supp. JA 1623-28)

ARGUMENT

I. The Fourth Circuit Has Decided An Important Question Of Federal Constitutional Law That Has Not Been, But Should Be, Settled By This Court.

(a) *The consistent application of the judicially created qualified immunity doctrine to § 1983 cases alleging the deprivation of Constitutional rights is an important matter deserving of the Supreme Court's attention and guidance.*

This appeal involves the cherished Fourth Amendment right of the Petitioner Isidro Gomez to be arrested only upon probable cause. There are no cases more important to the functioning of a civilized society than those confronting individual liberties guaranteed by the U.S. Constitution: "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman. . . ." *Ex parte Lange*, 85 U.S. 163, 21 L. Ed. 872, 18 Wall. 163 (1873).

The private cause of action created by 42 U.S.C. § 1983 was designed as a mechanism to redress violations of such constitutional liberties by those charged by law with enforcing these fundamental principles:

> The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (*quoting United States v. Classic*, 313 U.S. 299, 326 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, supra, 365 U.S. at 172.

> How "uniquely amiss" it would be, therefore, if the government itself — "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" — were permitted to disavow liability for the injury it has begotten. . . . A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guaranties, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. . . .

Owen v. City of Independence, 445 U.S. 622, 651 (1980).

The rights which the Petitioners seek to vindicate in this action are based upon conduct that Judge Hamilton, in his concurring opinion, characterized as "a disturbing commentary on the manner in which law enforcement activities are conducted in Cumberland County, North Carolina." (App. A, p. 24a) The Petitioners contend that the Respondent misused and abused his authority by providing false and misleading information to, and omitting critical exculpatory information from, his application to the magistrate for a warrant to arrest Isidro Gomez for murder, which information was material to the finding of probable cause. The Fourth Circuit, in reversing the decision of the District Court, ignored the Petitioners' contention and, based upon its own evaluation of the Respondent's "reasonableness," held that the Respondent was entitled to qualified immunity.

As set forth below, the Fourth Circuit's opinion conflicts with decisions of other United States Courts of Appeal. The Petitioners respectfully contend that this Court's precious judicial resources are necessary to resolve this conflict, so that disposition of claims based upon inviolable constitutional rights, which should apply equally and uniformly to all citizens, should not depend upon the Circuit in which the alleged constitutional violation occurs.

(b) ***This Court has never decided the civil equivalent of Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), and should use this case to bring harmony to the U.S. Courts of Appeal on this important constitutional issue.***

As a general rule, the issuance of a warrant by a neutral and detached magistrate creates the presumption that it was objectively reasonable for an officer to believe that there was probable cause. *See United States v. Ventresca*, 380 U.S. 102, 109, 85 S. Ct. 741, 746, 13 L. Ed. 2d 684 (1965). In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), however, this Court carved out an important exception to the traditional rule. In *Franks*, this Court held that where a criminal defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in an application for a search warrant, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires a hearing on the validity of the search warrant. Furthermore, if the defendant establishes at the hearing an intentional falsification or reckless disregard for the truth, and the application *sans* the false information is insufficient to establish probable cause, the search warrant is void and the fruits of the search are excluded. *Id.* at 154-55.

This Court reaffirmed *Franks* in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), holding that suppression of evidence is appropriate "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth." *Id.* at 923. Under such circumstances, "the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*

Since *Franks* and *Leon*, numerous United States Courts of Appeal have applied this test to § 1983 actions for malicious

prosecution, and particularly with respect to defendant officers' claims for qualified immunity. *See, e.g.*, *Butler v. Elle*, 281 F.3d 1014 (9th Cir. 2002); *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993); *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991); *Burke v. Beene*, 948 F.2d 489 (8th Cir. 1991); *Golino v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991); *and DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990). This Court, however, has never decided the civil equivalent of *Franks* or *Leon*. The most analogous decision of this Court, also frequently cited in cases applying *Franks* and *Leon* in the § 1983 civil context, is *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). In *Malley*, this Court held that defendant officers are not entitled to qualified immunity "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. . . ." *Id.* at 341.

The logical extension of *Franks*, *Leon* and *Malley*, in a civil § 1983 context, is that where a magistrate is misled by information in a warrant application that the officer knew was false or should have known was false but for his reckless disregard for the truth, then the officer has no reasonable grounds for believing that the warrant was properly issued, *Leon*, 468 U.S. at 923, and where an officer has no reasonable grounds for believing that a warrant should properly issue, the officer is not entitled to qualified immunity, *Malley*, 475 U.S. at 341. This is the rule of law applied by numerous other United States Courts of Appeal, as cited above and discussed more fully below, but ignored by the Fourth Circuit in this appeal. The Petitioners urge this High Court to take this opportunity to resolve this conflict between the Fourth Circuit and other U.S. Courts of Appeal, and establish a uniform test for determining qualified immunity where a law enforcement officer includes material false and misleading information in, and omits clearly critical exculpatory information from, an application to a magistrate for an arrest warrant.

II. The Fourth Circuit's Opinion Is In Conflict With Decisions Of Other United States Courts Of Appeal Holding That A Law Enforcement Officer Is Not Entitled To Qualified Immunity Where The Officer Either Intentionally Or With Reckless Disregard For The Truth Includes Material False And Misleading Information In, Or Omits Clearly Critical Information From, An Application For An Arrest Warrant To A Magistrate.

(a) *The Fourth Circuit's decision directly conflicts with decisions of other U.S. Courts of Appeal regarding the application of Franks v. Delaware and United States v. Leon to claims for qualified immunity in § 1983 civil actions.*

The qualified immunity defense is only available when the conduct of the official "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). As *Harlow* makes clear, the concept of "reasonableness" relates to the knowledge of clearly established rights, not the general nature of the official's conduct. This is entirely consistent with the principal that officials may only be held responsible for transgressing bright lines — the "bright line" is the clearly established law. Furthermore, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent officer should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. If a plaintiff alleges and proffers evidence that a government official violated clearly established law, then summary judgment on the basis of qualified immunity must be denied.

In this case, the Fourth Circuit misapplied this test and instead focused on its own freestanding evaluation of the Respondent's "reasonableness" in seeking an arrest warrant (*See* App. A, pp. 13a-23a), and not on whether a reasonable officer in the Respondent's position would have known that submitting material false and misleading information to a

magistrate in support of a warrant application violated clearly established law. By so doing, the Fourth Circuit's opinion conflicts with numerous decisions of other United States Courts of Appeal on at least two critical issues.

First, other U.S. Courts of Appeal have held that where an officer includes material false and misleading information in, and omits clearly critical information from, an application for a warrant, the officer is not entitled to qualified immunity. *See, e.g., Butler v. Elle*, 281 F.3d 1014 (9th Cir. 2002); *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993); *Golino v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991); *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991); and *Burke v. Beene*, 948 F.2d 489 (8th Cir. 1991).

Second, other U.S. Courts of Appeal have held that whether an officer intentionally or with a reckless disregard for the truth included false and misleading information to, or omitted clearly critical information from, a warrant application to a magistrate, and — more importantly for the purposes of this appeal — whether the warrant would have issued but for the false, misleading and excluded information, are questions of fact for the jury. *See, e.g., Golino, supra*; *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990); *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989); and *Hindman v. City of Paris, Tex.*, 746 F.2d 1063 (5th Cir. 1984).

In reversing the District Court's denial of summary judgment on qualified immunity grounds, the Fourth Circuit gave no weight to the material false and misleading statements and omitted information in the Respondent's warrant application. Instead, the Fourth Circuit, after stating that it was not required to view the Respondent's conduct and decisions in the light most favorable to the Petitioners (*see* App. A, p. 12a), usurped the function of the jury by engaging in its own evaluation of the facts — giving the Respondent the benefit of the doubt on all decisions he made — and deciding as a matter of law that the Respondent was entitled to qualified immunity. As a result, the Fourth Circuit has created a conflict with virtually every

other U.S. Circuit Court of Appeal, and has likewise run afoul of analogous precedent established by this Court.

That the Respondent supplied false and misleading information in his application for an arrest warrant cannot be disputed. The Respondent falsely reported to the magistrate that Isidro's body hairs were found on the body of the victim. This false statement puts Isidro at the second crime scene (Rickie Jean's car, where her body was found). The Respondent falsely reported to the magistrate that Isidro's shoe size was consistent with the size of the bloody shoe prints left by the perpetrator at the house, when the Respondent's own notes indicated otherwise. This false statement puts Isidro at the first crime scene (the Gomez residence, where the crime apparently occurred). The Respondent falsely reported to the magistrate that "witnesses" personally spoke with Isidro by telephone in Fayetteville at a time that contradicted Isidro's otherwise iron-clad alibi (when, in fact, only one witness stated this in 1996, and the statement was inconsistent with what that witness told investigators in 1980, only two days after the crime. This false statement destroys the credibility of Isidro's alibi and arguably provides him with the opportunity to commit the crime. The Respondent falsely reported to the magistrate that blood was found on a wet washcloth on the edge of the bathtub where Isidro had just showered (when, in fact, the 1980 serology report found no blood on the washcloth). This false statement directly linked Isidro to efforts to conceal the crime.

This case is also significant for what the Respondent did not report to the magistrate — clearly exculpatory information that was material to the Respondent's theory of the crime. The Respondent did not report that: (1) DNA tests on Rickie Jean's bloody fingernails did not find a match with Isidro; (2) Isidro's chief alibi witnesses had both passed polygraph tests in 1981; (3) latent fingerprints and palm prints lifted from both crime scenes did not match Isidro; (4) despite foreign blood found under Rickie Jean's fingernails, and evidence of defensive wounds indicating a struggle, Isidro had no cuts, scratches or bruises on his body; (5) Rickie Jean left Atlanta on Sunday

evening so she could go to work at Piedmont on Monday morning; (6) she loved her job and had never been so much as late for a single shift; (7) she failed to report to work on Monday morning; and (8) she was still wearing her nightgown when her body was found; — facts that all strongly suggest (as the D.A. ultimately acknowledged in dismissing the criminal charges) that Rickie Jean was murdered sometime prior to her scheduled work time on Monday morning, before Isidro even left Atlanta. (*See Statement of Facts, supra*) (*See also*, App. B, p. 45a)

Both the Fourth Circuit's opinion, in the lone footnote discussing this issue, and the concurring opinion of Judge Hamilton, expressly characterize these factual inaccuracies as "material." (*See* App. A, pp. 8a n.2, 24a) While this Court has not defined "materiality" in this specific context, it has in the analogous situation of the government's obligation to disclose evidence favorable to the accused in criminal cases under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In that context, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L. Ed. 2d 40 (1987) (*quoting United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985) (opinion of Blackmun, J.); *and see id.*, 473 U.S. at 685, 105 S. Ct. at 3385 (opinion of White, J.)). Moreover, in the context of misrepresentations and concealments, this Court has held that *material* misrepresentations or concealments are ones that are "predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys v. United States*, 485 U.S. 759, 771, 108 S. Ct. 1537, 1547, 99 L. Ed. 2d 839 (1988).

Consequently, by characterizing the factual inaccuracies in the Respondent's warrant application as "material," the Fourth Circuit acknowledged that the false and misleading information had a natural tendency to affect the magistrate's decision, and that there was a reasonable probability that disclosure of the

misrepresentations would have changed the result. *Ritchie*, *supra*; *Kungys*, *supra*. In virtually any other U.S. Court of Appeals, such conduct would result in the loss of qualified immunity.

Second Circuit Court of Appeals

The Second Circuit has held that:

> Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, as where a material omission is intended to enhance the contents of the affidavit as support for a conclusion of probable cause, *see generally*, *Rivera v. United States*, 928 F.2d at 605; *United States v. Strini*, 658 F.2d 593, 597 (8th Cir. 1981), the shield of immunity is lost, *see Malley v. Briggs*, 475 U.S. at 344-45, 106 S. Ct. at 1097-98 (adopting standard set in *United States v. Leon*, 468 U.S. 897, 923, 104 S. Ct. 3405, 3420, 82 L. Ed. 2d 677 (1984), as proper standard for objective reasonableness for qualified immunity purposes). An officer can "have no reasonable grounds for believing that [a] warrant was properly issued" "[i]f the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth," *United States v. Leon*, 468 U.S. at 923, 104 S. Ct. at 3421.

Golino v. City of New Haven, 950 F.2d 864, 871 (2d Cir. 1991).

In *Golino*, as here, a murder suspect filed a § 1983 action against the defendants for malicious prosecution. The defendants moved for summary judgment based on qualified immunity, and the plaintiff responded by contending that the defendants lost the "shield of immunity" by submitting false and misleading information in, and omitting material exculpatory information from, the warrant application to the magistrate. The Second Circuit affirmed the denial of summary judgment, holding that the evidence in the light most favorable to the plaintiff

demonstrated that the defendants materially misled the magistrate, thereby precluding summary judgment on qualified immunity grounds. *Id.* at 872.

Third Circuit Court of Appeals

In *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993), citing *Malley*, *supra*, the Third Circuit Court of Appeals held that: "If a police officer submits an affidavit containing statements he knows to be false or would know are false if he had not recklessly disregarded the truth, the officer obviously failed to observe a right that was clearly established. Thus, he is not entitled to qualified immunity." *Id.* at 1504. In *Lippay*, the plaintiff filed a § 1983 malicious prosecution action against the defendant narcotics agent arising from his arrest on drug charges. After a jury verdict in favor of the plaintiff, the District Court denied the defendant's post-trial motions. Based upon its interpretation of *Malley*, the Third Circuit affirmed the District Court, concluding that because the jury found that the plaintiff proved all elements of his Fourth Amendment seizure claim, it could not at the same time have concluded that the defendant did not violate a "clearly established" constitutional right of which "a reasonable person would have known." *Id.*

Ninth Circuit Court of Appeals

In the Ninth Circuit, "[i]f an officer submitted an affidavit that contained statements he knew to be false or would have known to be false had he not recklessly disregarded the truth . . . , he cannot be said to have acted in a reasonable manner, and the shield of immunity is lost." *Hervey v. Estes*, 65 F.3d 784, 788-89 (9th Cir. 1995) (*quoting Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991)). Where a plaintiff makes a substantial showing of actionable deception that is material to a finding of probable cause, summary judgment on the basis of qualified immunity is improper. *Butler v. Elle*, 281 F.3d 1014 (9th Cir. 2002).

In *Butler*, the plaintiff claimed the defendant submitted false and misleading information in his affidavit to the magistrate, who then relied upon that information in finding probable cause

for a search warrant. In addressing the defendant's qualified immunity defense, the court stated as follows:

> [N]o reasonable officer could believe that it is constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant. Accordingly, should a factfinder find against an official on this state-of-mind question, qualified immunity would not be available as a defense. . . . If he was reckless or deceitful in preparing the warrant affidavit, then he both violated Butler's rights and is not entitled to qualified immunity."

Id. at 1024. The court reversed the grant of summary judgment, holding that the plaintiff had made a substantial showing of actionable deception and materiality. *Id.* at 1025-26.

The Petitioners respectfully contend that under the legal principles applied by the Second, Third, and Ninth Courts of Appeal, based on this Court's decisions in *Franks*, *Leon*, and *Malley*, the decision of the District Court in this case, denying the Respondent's motion for summary judgment based upon qualified immunity, would have been affirmed. The same is true for virtually every other U.S. Courts of Appeal. *See, e.g.*, *Aponte Matos v. Toledo Davila*, 135 F.3d 182 (1st Cir. 1998) (reversing summary judgment in favor of officer where genuine issue of material fact existed as to whether officer obtained search warrant through use of material falsified facts); *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994) (officer not entitled to qualified immunity from § 1983 malicious prosecution claim due to affirmative misstatement in arrest warrant); *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991) (plaintiff came forward with specific evidence from which jury could infer that defendants recklessly made false statements in, and omitted material information from, their affidavits in support of an arrest warrant); *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990) (officers who presented affidavit with material misrepresentations and omissions to magistrate in support of arrest warrant were not entitled to qualified immunity); *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989) (directed verdict for officer improper where

genuine questions of material fact existed as to whether officer acted with reckless disregard for the truth in applying for search warrant); *and Olson v. Tyler*, 711 F.2d 277, 282 (7th Cir. 1985) ("[I]n cases in which suppression would be warranted [under *Leon*] because an officer was dishonest or reckless in preparing a warrant affidavit, that officer would not enjoy good faith immunity for civil damages.").

Not only is a decision by this Court necessary to bring the Fourth Circuit in line with the other U.S. Courts of Appeal, but it is also necessary to establish uniformity in the standard used by all Circuits in applying the *Franks* and *Leon* rule to claims of qualified immunity in § 1983 actions. For example, some U.S. Courts of Appeal hold that where an officer either intentionally or with reckless disregard for the truth provides false and misleading information to a magistrate in a warrant application, he has violated a clearly established constitutional right, and the shield of immunity is automatically lost, *see, e.g., Lippay v. Christos*, *supra* (3d Cir.). Others hold that the false, misleading or omitted information must be material or necessary to the finding of probable cause, *see, e.g., Butler v. Elle*, *supra* (9th Cir.). Still others hold that immunity is lost only where the judicial finding of probable cause is based solely on the false or misleading information, *see, e.g., Olson v. Tyler*, *supra* (7th Cir.). The Petitioners respectfully contend that such an important constitutional issue cries out for a uniform, nationwide standard, so that the Fourth Amendment will be applied equally to all.

In this case, as discussed with particularity in the *Statement of Facts*, the Petitioners produced substantial and credible evidence that the Respondent either intentionally or with reckless disregard for the truth provided false and misleading information to, and omitted clearly critical information from, his warrant application to the magistrate. Furthermore, the Fourth Circuit expressly stated that these numerous factual inaccuracies were "material" — meaning they had a natural tendency to affect the magistrate's decision to issue the warrant. Nonetheless, the Fourth Circuit ignored the majority rule among the U.S. Courts of Appeal, as discussed above, and engaged in its own evaluation

of whether it deemed the Respondent's conduct to be reasonable. (*See* App. A, pp. 13a-23a) The "magic question" in a qualified immunity analysis is whether the officer's conduct violated a clearly established statutory or constitutional right of which a reasonable officer would have known. *Harlow*, *supra*. Clearly, as recognized in virtually every other U.S. Court of Appeal, the Respondent's did. The Petitioners respectfully contend that Isidro's Fourth Amendment rights should be no different than those of Richard Lippay in Pennsylvania, Neil Butler in Idaho, or Anthony Golino in Colorado. (*see supra*).

(b) ***The Fourth Circuit's decision directly conflicts with decisions of this Court regarding the standard for summary judgment, and decisions of other U.S. Courts of Appeal applying these standards in the context of a claim for qualified immunity in a § 1983 action.***

Not only does the Fourth Circuit's opinion conflict with other U.S. Courts of Appeal on the issue of whether an officer who provides material false, misleading and incomplete information to a magistrate in support of a warrant application loses the protection of qualified immunity, but its freestanding analysis of the Respondent's overall "reasonableness" at the summary judgment stage invades the province of the jury and likewise conflicts with decisions of this Court and other U.S. Courts of Appeal.

In considering a motion for summary judgment, two long-standing legal principles apply. First, all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). Second, summary judgment is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In the summary judgment context, whether a particular piece of information is "material" is a mixed question of law and fact.

See, e.g., TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450, 96 S. Ct. 2126, 2132, 48 L. Ed. 2d 757 (1976).

The legal component of the "materiality" question asks whether the information is relevant to a particular issue in light of the controlling, substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). In this case, it is well established that under *Franks* and *Leon*, and the law of every other U.S. Court of Appeal (*see supra*), the submission of false, misleading and incomplete information to a magistrate in a warrant application is relevant to the question of qualified immunity. The factual aspect contemplates an inference as to whether the particular information would likely be given weight by one considering that question. *TSC Industries, supra* at 450, 96 S. Ct. at 2132. Consequently, the importance that a magistrate would place on material false, misleading omitted information in determining whether to issue an arrest warrant is a question of fact for the jury – not the Fourth Circuit.

In *Golino v. City of New Haven, supra*, the defendants contended they were entitled to qualified immunity as a matter of law because it was objectively reasonable for them to believe that if the warrant application was corrected to eliminate misrepresentations and disclose all of the omitted information, the revised affidavit would demonstrate probable cause to arrest the plaintiff. 950 F.2d at 871. Rejecting this contention, the Second Circuit concluded that the question of the "materiality" of the misrepresentations and omissions was a question for the jury to decide:

> This contention, which assumes that the omissions and misrepresentations were not material, hardly views the facts in the light most favorable to Golino as is required on a motion for summary judgment. . . .
>
> * * *
>
> Plainly the information that was misrepresented or remained undisclosed in [defendants'] presentations in support of probable cause were not immaterial to

> that question as a matter of law. The weight that a neutral magistrate would likely have given the [misrepresented and omitted information] is not a legal question but rather is a question to be resolved by the finder of fact.

Id. at 871-72.

In *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989), the owner of a house subject to a police search filed a § 1983 action against, *inter alia*, the officer who obtained the search warrant, contending that the officer acted with reckless disregard for the truth in applying for the search warrant. The District Court granted a directed verdict in favor of the officer, and the plaintiff appealed. On appeal, the Sixth Circuit first noted that "[a]n action under §1983 does lie against an officer who obtains an invalid search warrant by making, in his affidavit, material false statements either knowingly or in reckless disregard for the truth. This standard originates in *Franks v. Delaware*. . . ." *Id.* at 275 (internal citations omitted).

In discussing the difference between a *Franks* analysis in the criminal context and the equivalent analysis in a civil § 1983 case, the Sixth Circuit held as follows:

> While the court is necessarily the factfinder in a *Franks* suppression hearing preliminary to a criminal trial, in a §1983 action factfinding under the *Franks* standard is the province of the jury. *Hindman v. City of Paris, Tex.*, 746 F.2d 1063, 1067 (5th Cir. 1984). Indeed, in a recent §1983 case our Circuit has held that the question whether the judicial officer issuing the warrant would have done so even without the knowingly or recklessly false statement is one for the jury, and we remanded the issue for trial. *Yancey v. Carroll County*, 876 F.2d 1238 (6th Cir. 1989).

Hill, supra at 275-76. The Sixth Circuit reversed, concluding that genuine questions of fact existed that precluded a directed verdict in the officer's favor. *Id.* at 276; *see also*, *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990) ("'The underlying issue in deciding whether the police had probable cause to do

what they did is reasonableness, which is also the underlying issue in deciding negligence — a classic jury issue.' This rule applies also to cases in which the officers made the misrepresentations in an application for an arrest warrant." (*quoting Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (*en banc*)).

In this case, the Fourth Circuit disregarded these axiomatic tenants of summary judgment. In its opinion, the Fourth Circuit affirmatively declared that it was not required to scrutinize the Respondent's conduct in the light most favorable to the Petitioners: "[T]o the extent that Atkins decided to discount certain conflicting evidence, such as Isidro's alibi, we need not accept such discounted evidence in the light most favorable to him." (*See* App. A, p. 12a) By *sua sponte* giving the Respondent the benefit of the doubt on the decisions he made, and deciding that those decisions were reasonable, the Fourth Circuit is in direct conflict with this Court's decision in *TSC Industries*, *supra*, and the Sixth Circuit's decision in *Hill v. McInytre*:

> It is up to a jury, not a judge, to decide whether the pillars and the lack of a garage are such salient features that they would make it less than reckless to select the house that exhibited them. Furthermore, ***it is up to a jury, not a judge, to evaluate McIntyre's decision not to ascertain which house's utilities were in Amy's name: the existence of a good reason to hurry does not make this less a question of fact.*** And finally, the Hills are entitled to attempt to convince a jury that McIntyre was reckless not merely in selecting the wrong house but selecting *any* house.

Hill, 884 F.2d at 276 (emphasis added); *see also*, *Hindman v. City of Paris, Tex.*, 746 F.2d 1063, 1067 (5th Cir. 1984) ("Unlike a criminal case, in a civil suit attacking the legality of an arrest, a *Franks v. Delaware* factual dispute is not preliminary to a ruling upon the admissibility of evidence. Rather, it presents a classic issue of historical fact central to the substantive issues.").

In this case, the Fourth Circuit recognized at least some of the "material factual inaccuracies" in the Respondent's warrant application. (*See* App. A, p. 8a) The Fourth Circuit acknowledged the importance of those misrepresentations to a finding of probable cause by affirmatively characterizing the false information as "material." *Pennsylvania v. Ritchie, supra*; *Kungys v. United, supra*. By recognizing these material misstatements and not analyzing the Respondent's qualified immunity claim in the context of *Franks* and *Leon*, the Fourth Circuit deviated from the other U.S. Courts of Appeal. Furthermore, to the extent the Fourth Circuit decided for itself that these "material factual inaccuracies" were irrelevant to the magistrate's decision to issue a warrant (which contradicts the legal definition of "material"), and that it was not required to analyze the Respondent's decisions and conduct in the light most favorable to the Petitioners, it again created a conflict among the Circuits. The Fourth Circuit did not consider the proper question of whether the Respondent's conduct violated a well-established constitutional right of which a reasonable officer should have known, *Harlow v. Fitzgerald, supra*, but simply took its own view of the facts and concluded that the Respondent acted reasonably.[4]

---

4. In any event, the Fourth Circuit's own "reasonableness" evaluation is flawed. For example, the Fourth Circuit asserts that the Respondent was "entitled to disbelieve Isidro's alibi." (App. A, p. 19a) At his deposition, before consulting with his counsel on the issue, the Respondent stated that he had done nothing to investigate Isidro's alibi and was never able to refute Isidro's alibi. (Deposition of W.J. Atkins, p. 115) The Fourth Circuit also relied on the fact that the Respondent sought the approval of his superior officers before seeking an arrest warrant. (App. A, p. 20a) In fact, the information the Respondent provided to his fellow officers was the same false, misleading and incomplete information he provided to the magistrate. Furthermore, none of these other officers made any effort to verify the information provided by the Respondent, and they simply accepted as true what the Respondent told them. The Fourth Circuit also focused on the state district court probable cause hearing, which the Court concluded "afforded Isidro a full opportunity to litigate, in an adversary proceeding before an impartial

(Cont'd)

CONCLUSION

Based upon the foregoing, the Petitioners respectfully request that this High Court issue a Writ of Certiorari to review the decision of the Fourth Circuit Court of Appeals in this matter, for the purpose of resolving the conflict with the other U.S. Courts of Appeal created by the Fourth Circuit's decision and pronouncing, for the first time, a uniform, nationwide standard for applying the important constitutional principle adopted in *Franks v. Delaware*, *supra*, and *United States v. Leon*, *supra*, to claims for qualified immunity in civil § 1983 actions.

Respectfully submitted,

GARY K. SHIPMAN
Counsel of Record
C. WES HODGES, II
SHIPMAN & HODGES, L.L.P.
Attorneys for Petitioners
11 South Fifth Avenue
Wilmington, NC 28401
(910) 762-1990

(Cont'd)
judge, the issue of probable cause." (App. A, p. 22a) The uncontroverted evidence below was that strategic concerns inherent in such a preliminary hearing make it impossible to fully litigate the issue of probable cause. Because, by statute, the decision of the district court judge is not binding on the State (which can proceed with an indictment even upon a finding of no probable cause), a criminal defendant has too much to lose by exposing his defense case. Moreover, Isidro's attorney had no opportunity to review or test the physical evidence prior to the probable cause hearing.